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CITATIONS

553065—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 330

G. T. FOGLE & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of West Virginia (R. 3–7) is unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 30–37) is reported at 135 F. (2d) 117.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit (R. 37–38) was entered on April 21, 1943. A petition for

rehearing (R. 39–44) was denied on June 16, 1943 (R. 45). The petition for a writ of certiorari was filed on September 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner entered into three contracts providing for the rental to the United States of certain road-building equipment for designated rental periods. Each contract required petitioner, without additional cost to the United States, to transport the equipment to and from the point of operation and provided that payment would be made to the contractor, at the rate agreed upon, only for actual operating time, as determined by the proper administrative officer. Petitioner delivered the equipment to the site of operations but it was never used by the Government.

The questions presented are:

1. Whether the United States was guilty of any breach of contract entitling petitioner to recover damages.

2. Whether there was a "taking" by the United States of petitioner's property in the case of certain of the equipment which remained unused at the site of operations for some four months.

STATEMENT

Petitioner, G. T. Fogle & Co., and the United States, acting through the Procurement Division of the United States Treasury, entered into three contracts [1] in 1935 and 1936, regarding the rental of two concrete mixers and a gasoline shovel, for use on Works Progress Administration projects in West Virginia (R. 4–5, 20–21, 31). The first contract (ER TPS 41–72) was for the "rental" of "1 bag concrete mixer 100 hours" and specified the unit price as 75¢ per hour (R. 10, 21). The second contract (ER TPS 41–2713) covered the rental of a gasoline shovel for "not to exceed three months" at a "unit price" of $400 per month (R. 4, 17, 22). The third contract (ER TPS 41–4545) referred to the "Rental" of a concrete mixer (R. 18, 22) for the "Rental period one month—168 hours," at a price of $84.00.

The contracts contained "Standard Conditions [2] of Equipment Rental" (Form S. P. O. No. 7), requiring the contractor, among other things (R. 6–9, 26):

[1] Pursuant to stipulation, which appears as page "a" of the printed record here, and also at R. 46–47, the contracts were not included in the printed record, but photostatic copies are available to this Court as part of the certified record. Any references herein to precise terms of the contracts are taken from copies contained in the files of the Department of Justice.

[2] Form S. P. O. No. 7 appears in full in the Appendix, pp. 12–14. This form, attached to and made a part of the first two contracts, was inadvertently omitted from the third contract, but in the lower court petitioner conceded that this was an oversight and waived the defect (Pet. 3; R. 31).

> 1. Without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation, and to furnish fuel, grease, oil and operator or operators therefor, except as otherwise specified in the invitation for bids.

The Standard Conditions also provided:

> 5. All bidders must agree to the rental period specified in the invitation for bids, but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time, as determined by the proper administrative officer.

The mixer called for by the first contract was delivered by petitioner and received by the W. P. A foreman in good condition on September 23, 1935, but was never used, remaining idle on the project from that date until February 5, 1936 (R. 5, 16). The gasoline shovel covered by the second contract was delivered at the project, but was rejected by the W. P. A. District Director on the ground that it was "an excavator * * * and not the shovel of the usual type. This shovel can not be used on any job in this District" (R. 17–18).[3] Upon delivery of the concrete mixer cov-

[3] The second and third contracts further provided that "time lost on account of machine being unable to operate due to its mechanical condition (or absence of the operator) may be either deducted from this contract or equipment held enough (additional) time to make up for the time lost."

The matter in parentheses appears only in the second contract.

ered by the third contract, it was found by officials of the W. P. A. that this equipment had erroneously been "requisitioned" after the project had been completed and petitioner was informed that delivery would not be accepted (R. 13, 18–19).

Thereafter petitioner submitted claims to the State W. P. A. Administrator for damages on account of alleged breach of the three contracts (R. 10, 18).[4] The W. P. A. Deputy Administrator recommended partial payment of the first two claims and full payment of the third (R. 11, 12, 13), but on August 9, 1938, the Acting Comptroller General, on final settlement, denied all three claims and certified that no balance was due to petitioner from the United States (R. 20–24). This ruling was based principally on the fact that Paragraph 5 of S. P. O. No. 7 obligated the Government only for "actual operating time," and petitioner's equipment was admittedly never used by the Government (R. 21–22, 23).

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[4] Under the first contract petitioner asked $300 (75¢ per hour for the 100 hour rental period), claiming loss of income resulting from the fact that the mixer remained on the project for four months before notice was given by the Government that the equipment would not be used (R. 11, 16). Under the second contract petitioner asserted that no contention was made that the rejected gasoline shovel failed to conform to specifications and claimed damages of $549.03 (maximum rental of $1,200 less costs of delivery and removal, and operating expenses for three months) (R. 12, 18). Under the third contract petitioner merely claimed $9.18, the cost of delivering the concrete mixer to the project (R. 18–19).

Petitioner then sued under the Tucker Act (28 U. S. C. § 41 (20)) in the District Court of the United States for the Southern District of West Virginia for payment of the claims in question; but the court held that since the equipment had not been used, there was no liability on the part of the United States, in consequence of the aforementioned paragraph (R. 2–6).[5]

On appeal, the United States Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the district court (R. 30–37). After referring to Paragraph 5 of Form S. P. O. No. 7, the court held that "pursuant to the contracts, Fogle was to make the equipment *available for use* subject to the condition that the payment of rental fees would be made at the rate agreed upon in the contracts *only* for the actual operating time, *if* and *when* the equipment is used" (R. 34–35). A petition for rehearing was denied (R. 45–46).

ARGUMENT

No question of substantial or general importance is involved. The rules concerning the construction of contracts are not in dispute and there is no conflict of decisions. The only issue is whether under the particular circumstances petitioner has established a breach of contract entitling it to recover,

[5] Petitioner's suit also covered a claim of $80 for the rental of certain pipe, which the Government allegedly never returned (R. 5, 13–14), and recovered judgment for $80 on this count (R. 6–7). This item is not here involved.

and on this issue the decision below is clearly correct.

1. The United States committed no breach of contract. In each case, Paragraph 1 of Form S. P. O. No. 7 bound the petitioner "without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation"; Paragraph 5 provided that the agreed rental rate "shall apply to actual operating time only" and that "payment will be made only for such actual operating time, as determined by the proper administrative officer" (R. 6, 7, 8, 31).

Since it is conceded that none of the equipment covered by the contracts was ever actually used by the United States, and there is no evidence of fraud or bad faith on the part of the Government in failing to use the equipment (R. 35), these provisions conclude the case against petitioner, for their effect was to "commit(s) the government to nothing but to pay for" actual operating time. Cf. *Bulkley* v. *United States,* 19 Wall. 37, 40; *Lobenstein* v. *United States,* 91 U. S. 324; *Brawley* v. *United States,* 96 U. S. 168; *Kihlberg* v. *United States,* 97 U. S. 398.

From the standpoint of the Government's liability, the "contracts" in question constituted nothing more than offers by petitioner for the execution of unilateral contracts, which could ripen into "valid and binding" agreements only if and when accepted by the Government's actual use of the equipment. Cf. *Willard Co.* v. *United States,*

262 U. S. 489, 493, 494; *Atwater & Co.* v. *United States,* 262 U. S. 495, 498. And the chance that the offers would not be accepted "was a risk the company assumed, and no reason is perceived from relieving it from the consequences." *North American Com. Co.* v. *United States,* 171 U. S. 110, 127.[6] The only effect of the designated "rental periods" here was "to signify a purpose on the part of the government * * * [which] was liable to be changed at any time before it was executed." See *Bulkley* v. *United States,* 19 Wall. 37, at 40.

2. In connection with the first contract (ER TPS 41–72) petitioner seeks to avoid the impact of Paragraph 5 of Form S. P. O. No. 7 by arguing that this contract includes "a necessarily implied promise by the Government" (Pet. 34) to use the concrete mixer for the full 100-hour "rental period" (Pet. 36); that the contract must be construed in petitioner's favor because prepared by the United States; and that the recommendations by the Government's own officers are entitled to great weight (Pet. 51–56).

These arguments have no merit in the case of an unambiguous contract. The obligation of the

[6] Conceding that the same rules of construction applicable to contracts between individuals apply to contracts to which the United States is a party, there are no special "ideas of equity" by which only the Government is bound. Cf. *Smoot's Case,* 15 Wall. 36, 45.

United States being unequivocally limited to payment for actual operating time, "no exposition is allowable contrary to the express words of the instrument" (*Kihlberg* v. *United States,* 97 U. S. 398, 402), and it is immaterial whether, as petitioner repeatedly urges (Pet. 52, 63, 67, 74, 77), the construction or contracting officers believed or recommended that petitioner was entitled to damages.[7] Cf. *Brawley* v. *United States,* 96 U. S. 168, 173; *Simpson* v. *United States,* 199 U S. 397, 399;

[7] Actually, there is real doubt that the Government contracting officials accepted petitioner's view of the Government's commitment. Petitioner's main reliance in this connection is on the letter (R. 10–15) from the Treasury Procurement Office for West Virginia to the U. S. Treasury Accounts Office, at Charleston, West Virginia (Pet. 52). But this letter merely expresses an opinion as to whether "the contractor was damaged financially"; it does not reflect the views of the contracting officer as to the proper interpretation of the contract, or as to whether the United States was liable in damages for any breach thereof. For, after noting that, "There was no actual use of the equipment and payment cannot be authorized against this contract" (R. 10–11), the letter expressly declares that, "Recommendation for payment or rejection of this claim is not within the scope of the jurisdiction of the State Procurement Officer and the claim is presented only for the action of the General Accounting Office" (R. 11).

The recommendation of the W. P. A. Deputy Administrator that petitioner should be compensated in damages cannot be considered as a contemporaneous construction of the agreements by one of the contracting parties, since the contracting agency for the United States, as the contracts show on their face, was the Procurement Division of the United States Treasury.

Bowers Dredging Co. v. *United States,* 211 U. S. 176, 185, 187–188. Nor could any such officials waive any contractual rights of the United States. Cf. *American Sales Corporation* v. *United States,* 32 F. (2d) 141 (C. C. A. 5), certiorari denied, 280 U. S. 574.

Acceptance of petitioner's proposition that the Government impliedly undertook to use the mixer for the full rental period, leads to the anomaly, as the lower court pointed out, that by failing to use the equipment at all the Government became liable for the maximum rental, whereas if the equipment had been used only for a few hours, petitioner "could have recovered *only* for such limited use and no more" (R. 34–35).

3. There is no substance to petitioner's further argument, in regard to the first contract, that there was a taking of its property without just compensation, within the meaning of the Fifth Amendment (Pet. 75). Petitioner bases this argument on the fact that the mixer in question remained at the site of the W. P. A. project to which it was delivered for some four months before petitioner was advised, in response to an inquiry of a month earlier, that it might be removed (Pet. 75–76). The property in question was in no sense "taken" by the Government within the meaning of the Fifth Amendment. On the contrary, it was delivered by petitioner to the site of the project for a specified period, pursuant to a contract voluntarily made and specifying the conditions under which

petitioner was to be paid.[8] Cf. *Swift & Company* v. *United States,* 43 C. Cls. 409, 422; *Klebe* v. *United States,* 263 U. S. 188, 191–192; *Chesapeake & Potomac Telephone Co.* v. *United States,* 281 U. S. 385, 388; *Interocean Oil Co.* v. *United States,* 270 U. S. 65, 69; *Ball Engineering Co.* v. *White & Co.,* 250 U. S. 46, 57; *United States* v. *North American Co.,* 253 U. S. 330, 335.

4. In an attempt to circumvent Paragraph 5 of Form S. P. O. No. 7, in connection with the second and third contracts, petitioner seeks to spell out a conflict between that provision and the following provision, contending that this one shows a purpose to bind the Government to pay for the full "rental periods," and must control, being typewritten, rather than printed (Pet. 56–62):

> "Time lost on account of machine being unable to operate due to its mechanical condition, or absence of the operator, may be

[8] The lower court correctly decided that no recovery could be allowed for expenses of delivery, on the theory of a mistake of fact which induced the second and third contracts. For the meeting of minds which would be prerequisite to the implication of a contract in fact to pay for those expenses (see *B. & O. R. R.* v. *United States,* 261 U. S. 592, 597) is precluded by the express provisions of Paragraph 1 of Form S. P. O. No. 7, requiring petitioner, "Without additional cost to the Government, to furnish transportation of all equipment to and from the point of operation * * *" (see Appendix, p. 13). Petitioner does not urge this theory, and in fact disputes the conclusion below that the second and third contracts resulted from mutual mistakes of fact (Pet. 21).

deducted from this contract or equipment held enough additional time to make up for the time lost."

But this provision, instead of conflicting with Paragraph 5 of Form S. P. O. No. 7, reinforces the latter provision, making doubly clear the intention to obligate the Government only for the "actual time" that petitioner's equipment was in use. The obvious purpose of this clause was to protect the Government against loss of time, due to the specified causes, once the equipment had been put into actual operation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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